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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 60

SEA VIEW, INC., ET AL,
Petitioners,

versus

M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit, and
BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. .....

SEA VIEW, INC., ET AL,

Petitioners,

versus

M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

The petition of Sea View, Inc., et al, respectively, shows unto this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED

The minor children of Emanuel Weinstein, brought suit in the name of their Guardian for recovery under Sec-

tion 24, Mississippi Code of 1942 of claimed gambling losses of their father in the amount of $83,959.00 and costs. It was alleged in the Complaint that Emanuel Weinstein established a mercantile business in Biloxi, Mississippi, and that he gambled large sums of money and paid for his losses by checks, or else, checks were cashed, and money received for the checks was lost in gambling to the defendant. And it was alleged that because of the uncontrollable desire to gamble by Weinstein, and by reason of his gambling losses that Emanuel Weinstein and his wife were adjudged Bankrupts in the District Court of the United States for the Southern Division of the Southern District of Mississippi, and that the plaintiffs were entitled to recover the monies lost.

Various defenses were made by the answer of the petitioners here, said defense being, (1) a denial of the claim, (2) the one year and the three year Statutes of Limitation, (3) that any losses became an asset of the bankrupt estate, and (4) that the Statute sued on was unconstitutional.

The deposition of Emanuel Weinstein, the person who purportedly lost the money was taken and Motion for Summary Judgment was made by the Petitioners, which motion was based on the pleadings and the deposition of Emanuel Weinstein, the Mississippi one year Statute of Limitation and the Mississippi three year Statute of Limitation. The District Court followed the applicable Mississippi Law and decisions of the Mississippi Supreme Court as to the governing law and construction of the Mississippi Statutes and entered judgment for the Petitioners here. The Respondents

appealed to the Court of Appeals, which Court reversed the District Court and remanded the case, said case being reversed on April 13, 1951.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which a writ of certiorari should be granted are as follows:

1. The Circuit Court of Appeals in this case failed to follow the governing Mississippi decisions of

Tippin Vs. Coleman, 61 Mississippi 516,

Jordan Vs. McKenzie, 30 Miss. 32 and

Anding Vs. Davis, 38 Mississippi 574, in construing the Statute involved as not being joint and as being tolled by the minority of the plaintiffs.

2. The decision of the Circuit Court of Appeals in holding Section 24 of the Mississippi Code of 1942 to be a remedial statute and not a penal statute is in conflict with the Mississippi cases of *Bank of Hickory Vs. May, 119 Mississippi 239, 80 Southern 704, Rogers Vs. Newton, 191 Mississippi 611, 3 Southern (2nd) 816.*

3. There is presented here a novel question of general interest to the Bar.

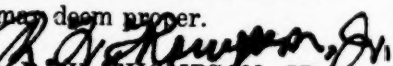
C.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on April 13, 1951.

The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Code, Annotated.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court for its review and determination on a day to be named therein, a full and complete transcript of the record and all proceedings in case No. 13231, entitled on its docket "M. J. Weinstein, Guardian of Maher Jacob Weinstein and Judith Ann Weinstein, et al, Appellants, Vs. Sea View, Inc., et al, Appellees", and that said judgment of the said Court of Appeals may be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for such other relief as the Court may deem proper.



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IN THE

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OCTOBER TERM, 1950

No. .....

SEA VIEW, INC., ET AL,

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versus

M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,

Respondents.

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported, but was rendered on April 13, 1951 and is found at Page 94, of the record.

Jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code Annotated.

STATEMENT OF THE CASE

Reference is respectfully made to "Summary Statement of Matter Involved", Supra, in the Petition for the Writ of Certiorari.

The Complaint in the District Court alleged that Emanuel Weinstein, the father of the minors, on whose behalf the suit was brought by the Guardian, had lost a large sum of money gambling at an establishment owned and operated by the Petitioners here. The suit was brought under the Mississippi Statute, Section 24 of the Mississippi Code of 1942, a copy of which is found in the Appendix hereto annexed. The District Court disposed of the case by Summary Judgment, basing its judgment on the deposition of the man who allegedly lost the money, and holding that the statute sued on was penal, and that the Mississippi one year Statute of Limitation applied, but if mistaken, that the action was certainly one for money had and received, and therefore; controlled by the Mississippi three year Statute of Limitation. The Court of Appeals reversed the District Court.

SPECIFICATIONS OF ERROR

1. The United States Court of Appeals erred in holding that the Statute under which the suit is brought was remedial and that the six year Statute of Limitation was applicable.

2. The United States Court of Appeals erred in holding that the action given by the Statute was not joint.

3. The Court erred in failing to follow the Law of the State of Mississippi.

ARGUMENT

1.

The Statute under which the suit was brought was in derogation of the common law and created a new cause of action formerly unknown by the Laws of the State of Mississippi. Section 24 of the Mississippi Code of 1942 is the Section upon which this suit was predicated. The District Court in a well reasoned opinion held that said Statute was penal in nature had to be strictly construed, being in derogation of the common law and that the Mississippi Statute of Limitation, with reference to penalties applied and that; therefore, the action sued on was barred. The Court of Appeals for the Fifth Circuit reversed the District Court and held that the statute was remedial and that the six year Statute of Limitation applied. We insist that this ruling of the Court of Appeals is in conflict with the Mississippi cases of *Bank of Hickory Vs. May, 119 Miss. 239, 80 Southern 704, Rogers Vs. Newton, 191 Miss. 611, 3 Southern (2nd) 816.* Section 2202 of the Mississippi Code of 1942, is not applicable in this suit or in a suit for a civil penalty such as the one here, as said Section of the Mississippi Code is found in the chapter on Crimes and Misdemeanors; but furthermore, if a statute is penal in law, it must be so construed even though the Legislature might declare otherwise, *Goldstein Vs. Board of Mississippi Levee Commissioners, 153 Miss. 783, 121 Southern 856, Helwig Vs. United States 188 U. S. 605.* Furthermore, the statute

does not permit any offsets for winnings at gambling, and there is no provision for offset if the winnings exceed the losses. The recovery permitted is a fixed amount and therefore a penal action. *Watts Vs. Malatesta, 262 N. Y. 80, 88 A. L. R. 1072.*

2.

The Statute sued on creates an action under which some several named people might sue for the penalty. Had Emanuel Weinstein, the man who purportedly lost the money not lost, there would have been no cause of action, but if he lost the money, the action accrued to him through the statute and by virtue of the same statute, a derivative action arose to the minor children. The action could be brought by the man losing, by his wife or his children and the statute provided for a single suit, which authorized only the ones named in the statute to sue and the Statute of Limitation began to run immediately upon the loss and could not therefore, be tolled by the minority of the plaintiffs. *Tippin Vs. Coleman, 61 Miss. 516, Jordan Vs. McKenzie, 30 Miss. 32* and *Anding Vs. Davis, 38 Miss. 574.*

The Court of Appeals held that the six year Statute of Limitation applied. This is in conflict with the law of the State of Mississippi. Section 729 of the Mississippi Code of 1942 is the three year Statute of Limitation and even though the Statute sued on was remedial rather than penal, the three year Statute of Limitation would apply under Mississippi law, as the cause of action created by the Statute could be nothing more than an action for money had and received or upon an implied contract to pay back the

amount gained in a game of chance. *Chandlee Vs. Tharp, 161 Miss. 623, 137 Southern 540.* The Court of Appeals in its opinion, (*See Record page 97*) apparently recognized the law to be that Statutes authorizing a third person to recover money lost by gambling is penal, *Cole Vs. Groves, 134 Mass. 471; In Re Barker 56 Vermont 14,* but held that the instant suit was brought by the persons injured. The Court of Appeals is clearly erroneous in this assumption, as the suit was brought by the Guardian of the children of the man who lost (the injured one) and therefore, the suit was brought by third persons and therefore, the Statute is certainly penal and is barred by the one year Statute of Limitation as aforesaid, but in any event is barred by the three year Statute of Limitation.

Respectfully submitted,

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Of Counsel.

APPENDIX

FROM MISSISSIPPI CODE OF 1942:

24. Loser may sue and recover money or property lost. — If any person, by playing at any game whatever, or by betting on the sides or hands of such as do play at any game, or by betting on any horse-race or cock-fight, or at

any other sport or pastime, or by any wager whatever, shall lose any money, property, or other valuable thing, real or personal, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, or his wife or children, may sue for and recover such money, property, or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, with costs: Provided that this and the two preceding sections shall not apply to contracts for future delivery which are valid under succeeding sections of this chapter.

731. Action for penalty commenced in one year. — All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

729. Actions to be brought in three years. — Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.

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FILED
JUL 14 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 60

SEA VIEW, INC., ET AL.,
Petitioners,

versus

M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,
Respondents

BRIEF OF COOPERS, INC., ET AL., INTERVENING CREDITORS, RESPONDENTS, IN OPPOSITION TO THE PETITION OF SEA VIEW, INC., ET AL., FOR A WRIT OF CERTIORARI.

ALBERT SIDNEY JOHNSTON, JR.,
Attorney for Respondents,
Coopers, Inc., et al.,
Intervening Creditors of E. Weinstein
and H. Weinstein, Bankrupts.

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Cases Cited

Banister v. *Solomon et al.*, 126 F. (2d) 740, 1, 2, 3 ....
Bollemueller v. *Wilson & Co.*, 57 F. Supp. 766 .....
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Statutes Cited

Sec. 70, Bankr. Act, Title 11 USCA Sec. 110 .....
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SUPREME COURT OF THE UNITED STATES

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SEA VIEW, INC., ET AL.,

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M. J. WEINSTEIN, GUARDIAN OF MAHER JACOB WEINSTEIN AND JUDITH ANN WEINSTEIN,

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6

BRIEF OF COOPERS, INC., ET AL., INTERVENING CREDITORS, RESPONDENTS, IN OPPOSITION TO THE PETITION OF SEA VIEW, INC., ET AL., FOR A WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

The petition in this case purports to present two points for the consideration of the Court. The first is headed "Summary Statement of the Matter Involved", and the second, "Reasons Relied on for the Allowance of the Writ". The first misstates the facts and the second presents nothing concrete for the court to act upon. The two will be discussed together, and the fallacy in the argument of petitioner made apparent.

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Realizing that this Court desires to have the assistance of a brief for the respondent when considering applications for writ of certiorari, *Furness, Withy & Co., Ltd.* v. *Yang-Tsze Insurance Association, Ltd., et al.*, 242 U. S. 430, *The Texas & Pacific Railway Company, Petitioner* v. *Barrett Gibson, Administrator*, No. 1028, May 31, 1927, Journal and Reports of the Supreme Court, respondents, Coopers, Inc., et al., requested, and were granted, an extension of time in which to file their brief in opposition to the petition for writ of certiorari.

If the bankrupts, Emanuel Weinstein and H. Weinstein, could have sued to recover the substantial part of his, their losses, such right would pass to his, their, trustee(s) in bankruptcy. *Klein* v. *Morris Plan Industrial Bank*, 132 F. 2d, pages 809, 810, opinion by Clark, Circuit Judge. *Charness* v. *Katz*, D. C. Wis. 1943, 48 F. Supp. 374, 52 Am. Bankr. Rep. N. S. 391, where it was held that a bankrupt's rights under St. 1941, Sec. 348.10 (Wis.) to recover gambling losses did not involve wrongs to "person, feelings or reputation", which were personal to the bankrupt, but involved damage to property and passed to trustee in bankruptcy. Section 70, Bankruptcy Act, Title 11 USCA § 110. And incidents of alienability of personalty are determined in federal courts according to local law. *In re Schenberger*, D. C., 102 F. 978; *In re Martin*, 6 Cir., 47 F. 2d, 498; *Dooley* v. *Pease*, 180 U. S. 126, 21 S. Ct. 329, 45 L. Ed. 457.

The District Court did not follow the applicable Mississippi law and decisions of the Mississippi Supreme Court, "as to the governing law and construction of the Mississippi Statutes", as said by Petitioners. Their purported statement of the facts are mere conclusions.

The Court of Appeals did not hold that the state statute of limitations, Section 750, Code of 1942, was tolled by

the minority of the plaintiffs. On the contrary, the Court, by Hutcheson, Chief Judge, said:

> "• • • Because, as set out above, we have held that the six-year is the applicable statute of limitation and none of the claims are barred, a determination of appellants' additional point, that, by Section 750, the running of the statute is tolled, is not necessary, and since it is a matter of State law and we are pointed to no Mississippi decision construing the invoked statute, we will not undertake to construe it."

The Mississippi cases of *Hickory* v. *May*, 119 Miss. 239, 80 So. 704, and *Roberts* v. *Newton*, 191 Miss. 611, 3 So. (2d) 816, cited by petitioners, are not in point. In *Bank of Hickory* v. *May*, 119 Miss. 239, 80 So. 704, at page 705, the Court, through Sykes, Jr., said:

> "• • • This court had repeatedly construed what is now section 4670 of the Code of 1906. To maintain an action under this section it is unnecessary that the plaintiff or complainant should have been actually damaged one cent. It is merely necessary to show that the sheriff failed to return to execution on the return day without a good excuse. When this is done the sheriff becomes liable regardless of actual damages for an arbitrary amount, a fixed sum, namely, the amount of the execution, together with 5 per cent. damages and all costs."

In *Rogers* v. *Newton*, 191 Miss. 611, 3 So. (2d) 816, 818, the Court, through Smith, Chief Justice, said:

> "• • • Bearing in mind that the issuance of this certificate of itself inflicts no injury on the school teacher or carrier, it will readily be seen that the liability here imposed is for a fixed sum to be paid whether injury has been inflicted or not on the teacher or carrier by the issuance of the pay certificate, or on any holder thereof."

The statute of Mississippi involved in the case at Bar, **Section 24, Mississippi Code** of 1942, provides that the loser may sue and recover money or property lost, not a fixed amount, to be arbitrarily assessed, but "such money, property, or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, with costs."

Contrary to the position of petitioners, no novel question of general interest to the Bar is presented in this cause. The case of *Watts* v. *Malatesta,* 262 N. Y. 80, 88 A. L. R. 1072, cited by petitioners, is not in point here. The New York Court of Appeals, by Crouch, J., held that a professional specializing in the field of bookmaking, may not offset his losses against the loser's claim. The Court said:

> "How may that be, if he (the professional) has no cause of action at all? To permit it would be to permit pro tanto what the law denies in toto. * * *."

And petitioners finally argue that even though the statute sued on was remedial rather than penal, the three-year statute of limitation would apply under Mississippi law, as the cause of action created by the statute could be nothing more than an action for money had and received or upon an implied contract to pay back the amount gained in a game of chance, citing *Chandlee* v. *Tharp,* 161 Miss. 623, 137 So. 540. The difficulty with such position is that it is diametrically opposed to the Mississippi case of *Rather* v. *Moore,* 179 Miss. 78, 173 So. 664, in which the Court, through McGowen, J., said:

> "If we were to say that the liability is statutory that would not avail the appellants here, for the reason that not being a penalty, the liability therein imposed would not fall within the three-year statute but would be covered by the general language of the six-year statute quoted supra."

In his specially concurring opinion, in *Rather* v. *Moore,* 179 Miss. 78, 173 So. 664, Smith, Chief Justice, at page 668, said:

> "* * * But when applied to statutory obligations, the liability, in the last analysis, rests not on a contract, but on the obligation imposed by the statute itself; and the limitation on the time within which an action on this obligation can be brought is that prescribed by section 2292, Code 1930, i. e., six years. 37 C. J. 749, and authorities cited in note 38 thereto."

For purpose of determining applicable statute of limitation, a "liability created by statute" is a liability which would not exist but for the statute. *Bottemueller* v. *Wilson & Co.,* 57 F. Supp. 766, citing *Fidelity & Deposit Co. of Maryland et al.* v. *Lindholm,* 9th Cir., 66 F. (2d) 56, 58, as follows:

> "A liability created by statute is a liability which would not exist but for the statute. *Hocking Valley R. Co.* v. *New York Coal Co.,* (CCA-6), 217 F. 727, 730."

In 24 Am. Jur., Gaming and Prize Contests, 455, 456, § 79, it is said:

> "At common law, money lost at gaming cannot be recovered. Independent of statute, the modern rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, 'ex-turpi causa non oritur actio' applying, and the loser being regarded as in pari delicto with the winner in such cases. Any recovery by the loser from the winner is dependent upon state. * * *."

Since money lost at gaming cannot be recovered at common law, 24 Am. Jr., Gaming and Prize Contests, 455, 456,

§ 79, we must look to the statute. The cause of action alleged by plaintiff-respondent, is one given by Section 24, Mississippi Code of 1942. It is therefore a statutory action. Such statute, however, does not prescribe the time within which the action must be brought to recover the money or property lost and paid over to the winner. Such action, in Mississippi, is one created by statute, to recover the statutory obligation, and the liability in the last analysis, rests not on a contract, but on the obligation imposed by the statute itself. The Mississippi Supreme Court, in *Rather* v. *Moore, supra,* 173 So. 664, holds that such statutory liability does not fall within the three-year statute but is covered by the general language of the six-year statute, Section 722, Mississippi Code of 1942.

The decision of the Court of Appeals for the Fifth Circuit holding that the six-year statute of limitations is applicable, and not the three-year statute, is correct and certiorari should be denied petitioners.

In *Saunders* v. *Mitchell,* 61 Miss. 321, it was held that where a bankrupt omitted land from his schedule and the estate surrendered did not pay the costs of the proceeding, and the assignee and creditors did not know of his right to the land, there was no presumption of abandonment thereof, or of surrender of debts; and neither he nor his heirs could recover the land.

In *Valier* v. *Spiers Milling Co.* v. *Foote,* 277 F. 519, it was held that the trustee in bankruptcy not only takes the title of the bankrupt, but is vested with all the rights of a creditor holding a lien by legal or equitable proceedings, and also a judgment creditor holding an execution duly returned and unsatisfied.

In re Matheny, 57 F. (2d) 330, the court held that the bankruptcy trustee is entitled to rights and remedies of lien creditor.

In the Mississippi case of *Warwick* v. *Meridian Hotel Co.*, 177 Miss. 611, 170 So. 820, the court held that bankruptcy assignee, indicating choice not to accept certain property as part of estate by definite declaration, positive action, or unequivocal forbearance to act, with actual or imputed knowledge of facts, waives claim thereto. (Bankr. Act, sec. 70, 11 USCA sec. 110).

In the Mississippi case of *U. S. Fidelity & Guaranty Co.* v. *Mound Lake Plantation Co.*, 188 Miss. 539, 195 So. 496, the court held that where trustee in bankruptcy had knowledge of existence of cause of action to have conveyance made by bankrupt set aside as fraudulent, and took no effective steps to enforce rights of creditors in the property, trustee "elected" to abandon the claim, and an individual creditor could seek to have the conveyance set aside.

In the cited case of *U. S. Fidelity & Guaranty Co.* v. *Mound Lake Plantation Co. et al.*, 188 Miss. 539, 195 So. 495, 496, the court, through Griffith, J., at page 496, said:

> "A trustee in bankruptcy is not bound to pursue property the recovery of which would involve the estate in expensive and difficult litigation; and, in such situations, he must make an election within a reasonable time. If, within a reasonable time, he fails to actively assert and to continue actively to assert his claim, he will be deemed to have elected to abandon it to such creditors as may thereafter pursue it. This subject is sufficiently dealt with in 8 C. J. S. pp. 671, 672, Bankruptcy, § 201. More than a reasonable time had elapsed here before the filing of the intervention petition in this case."

Emanuel Weinstein and Hermeen Weinstein, his wife, were adjudged bankrupts in March, 1948, after filing their petition in bankruptcy on March 5, 1948. Assuming, for

the sake of argument, but not admitting, that the three-year statute of limitations of Mississippi is applicable in a suit to recover gaming losses, a receiver or trustee in bankruptcy has an additional two (2) years subsequent to the date of adjudication, to institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law has not expired at the time of the filing of the petition in bankruptcy. * * *." Bankr. Act. § 11, sub. e, 11 USCA § 29, sub. e. *Banister* v. *Solomon et al.*, 126 F. (2d) 740, 741, 742, 743. Coopers, Inc., a creditor of such bankrupts, for itself and all of the creditors of the bankrupts, intervened in the action against the defendants, petitioners, on June 6, 1949, and alleged the failure and refusal of the receiver and trustee to pursue the cause of action to recover the gaming losses from such defendants, who won such losses and to whom the money was paid.

The statute of limitation of three years had not run as to any recoveries for losses at gambling beginning with the loss of June 2, 1945, down to and including the loss of June 6, 1946, and such Mississippi statute of limitations of three years was superseded by the Federal statute, Bankr. Act § 11, sub. e, 11 USCA § 29, sub. e, to the extent that first the trustee or receiver, and next the creditors, have at least two years from the date of adjudication in which to commence suit.

The authorities cited by petitioners do not support their views. They are not in point.

The decision of the Court of Appeals for the Fifth Circuit is not contrary to the decisions of other Courts of Appeal of the United States, and not contrary to any decided cases of the highest Court of the State of Mississippi.

Conclusion

Petitioners have failed to show any "special and important reasons" why the writ applied for should be granted. Hence, it follows that under the rules of this court it should be denied, at their costs.

Respectfully submitted,

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Intervening Creditors of E. Weinstein
and H. Weinstein, Bankrupts.